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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

TOM MATHER et al.,

Plaintiffs, Cross-defendants and Appellants,

v.

SHIRLEY BROOKS et al.,

Defendants, Cross-complainants and Respondents.

F037265

(Super. Ct. No. 238803)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

Ronald S. Sims for Plaintiffs, Cross-defendants and Appellants.

Law Office of Richard J. Papst, Richard J. Papst and Kathryn M. Fox for Defendants, Cross-complainants and Respondents.

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## STATEMENT OF THE CASE

On May 5, 1999, appellants filed an unverified complaint in Kern County Superior Court for damages arising from the purchase, sale, and repossession of a 1994 T-600 Kenworth semi-truck. Appellants named respondents as defendants and prayed for $30,000 in direct damages arising from breach of contract, $78,850 in consequential

damages for loss of use of the vehicle, $1,360 for costs of mitigation, $10,608.10 in vehicular repairs, and punitive damages according to proof.

On July 26, 1999, respondents filed a general denial of the material allegations of the complaint and pleaded nine affirmative defenses.

On the same date, respondents filed a cross-complaint alleging two causes of action and praying for $4,860.53 in damages, $50,000 in punitive damages, and interest at the rate of 10 percent per annum from May 5, 1999.

On August 25, 1999, appellants filed an answer generally denying the material allegations of the cross-complaint and setting forth 11 affirmative defenses.

On September 29, 1999, the court filed an order striking the prayer for punitive damages in the cross-complaint pursuant to the stipulation of the parties.

On November 1, 1999, the court conducted a mandatory settlement conference and set the cause for trial on May 8, 2000.

On December 1, 1999, the court appointed Jose R. Benevides, as arbitrator in the case (Cal. Rules of Court, rule 1605).

On December 9, 1999, the arbitrator filed a notice of arbitration to be held on February 15, 2000.

On January 27, 2000, appellants filed a notice of trial set for May 8, 2000, in superior court.

On April 5, 2000, the court granted Gerald R. Stein's motion to withdraw as attorney of record for respondents due to their nonpayment of legal fees. The court informed respondents of the trial, pretrial, and mandatory settlement conference dates in this matter.

On April 7, 2000, the court conducted a mandatory settlement conference and set the matter for a three-day bench trial beginning on May 8, 2000.

On May 8, 2000, a bench trial commenced before Sidney P. Chapin, judge of the superior court. On the same date, appellants filed their trial brief, witness list, and exhibit list.

On May 9 and 10, 2000, the court conducted further hearings on civil bench trial and all parties rested on the latter date.

On June 9, 2000, appellants filed a posttrial brief pursuant to order of the court. On June 14, 2000, respondents filed a posttrial brief. On June 23, 2000, appellants filed a response brief.

On September 5, 2000, the court filed a statement of intended decision granting respondents judgment on the complaint and cross-complaint.

On September 15, 2000, appellants filed a request for statement of decision.

On October 25, 2000, the court filed a formal judgment in favor of respondents and awarding them $4,860.53 in damages and $9,242.50 in agreed attorney fees and costs.

On December 13, 2000, appellants filed a timely notice of appeal from the formal judgment.

## STATEMENT OF FACTS

On May 12, 1997, respondent James Thiele (Thiele) purchased a used 1994 T-600 Kenworth semi-truck (VIN 1XKADB9X3RS614132) from the Bakersfield dealership of Central California Kenworth. He borrowed $40,000 from his mother, respondent Shirley Brooks (Brooks), for the down payment and financed the balance of $16,229 through Green Tree Financial Servicing Corporation (Green Tree). Thiele agreed to pay Green Tree the balance in 30 monthly payments of $652.06 beginning June 15, 1997. The due date for the final payment was December 1999.

After making the first payment of $652.06 on June 18, 1997, Thiele was taken into custody and incarcerated. He asked his mother to help him. Brooks, in turn, asked her other son, Eric Jacobs (Jacobs), to help her with the truck. Brooks and Jacobs began

efforts to lease or sell the truck. Their initial negotiations involved one Benny Golden. Thiele told Golden that both Jacobs and Brooks were authorized to deal with the truck. Golden had the truck checked out and learned there was a mechanical problem with the driveline. Because respondents were unwilling to pay for repairs, Golden withdrew from negotiations for the truck.

During this same time, respondents began talking to appellant Tom Mather about purchasing the truck. Tom and his wife, appellant Karen Mather, owned Mather Dairy and Mather Distributing. Thiele had a business relationship with the Mathers before his incarceration. Jacobs and Brooks began meeting with appellants and the latter agreed to buy the truck. On July 9, 1997, appellants took possession of the vehicle.

One or two weeks later, respondents prepared and delivered a written, backdated contract to the appellants. The contract provided that appellants would buy the truck for $50,000, obtain liability insurance on the vehicle, payoff Green Tree's lien within 12 months, and pay the balance of $33,000 to Brooks in monthly installments at 10 percent interest. Shirley Brooks signed off as a principal and Eric Jacobs signed as a witness. The parties further agreed that an attorney would "draw up the final written contract to be signed and agreed upon by both the buyer and seller." Since Brooks was working in Port Hueneme, Jacobs was to monitor payments under the contract. Jacobs told appellants if the money was not paid, he would be coming to collect it. He also indicated that appellants could contact him if there was any problem.

On July 21, 1997, appellants made their first payment of $677 to Green Tree.[1] At some point, appellants sent Jacobs a list of agreed-upon contractual terms. During the remainder of 1997 and through March 1998, appellants continued to make monthly

[1] The payment was $24.96 more than the monthly amount respondents owed to Green Tree. Appellants continued to make payments to Green Tree in the sum of $677.

payments on the truck. On December 6, 1997, appellants made a payment of $727, which included two late fees. However, the written contract did not provide for late fees. Moreover, respondent Thiele's contract with Green Tree provided a grace period until the 25th of the month for each remittance.

On February 22, 1998, respondent Thiele prepared and signed the second contract. Thiele entered into the contract believing that appellants' son, Troy Mather, would be a signatory to the agreement. Appellants did not know that Thiele, rather than an attorney, drafted the new contract. On March 28, 1998, appellants and respondent Brooks also signed the agreement. The agreement did not include an integration clause or a waiver provision but did provide for forfeiture of the vehicle upon breach. The new contract further provided that Green Tree held a lien against the truck in the amount of $12,248.70, appellants would pay the sum of $5,000 to Green Tree within 60 days of signing the contract, and that appellants would pay the balance of the lien to Green Tree by July 15, 1998.

In addition, appellants agreed to pay respondents the sum of $37,642.02 in 30 monthly installments of $1,254.74 commencing August 1, 1998. The contract also included a 10-day grace period, a late fee provision, a redemption clause, and a provision nullifying the contract in the event appellants failed to make the balloon payment to Green Tree within 60 days of signing the contract.

The $5,000 balloon payment was due and payable to Green Tree on May 28, 1998. Appellant Tom Mather contacted Jacobs and said they needed more time to meet this obligation. Jacobs told them as long as they met the monthly payment, they could pay the balloon payment when they could afford to. In June 1998, appellants incurred $3,117.64 in maintenance costs for the truck. In July appellants incurred an additional $1,925.43 in truck maintenance costs. On July 1, 1998, respondent Thiele got out of jail. Appellants hired him and then terminated him after he transported one load. At that point, Thiele had no truck and no job. On July 10, 1998 and several subsequent

occasions, Thiele demanded that appellants refinance the truck and pay him off but appellants refused.

On or about July 3, 1998, appellants told Jacobs they could make only $3,500 of the $5,000 balloon payment and needed more time to satisfy the $1,500 balance. Later that day, appellant Karen Mather made out check No. 6108 for the sum of $3,500. However, on July 5, 1998, the balance in appellants' checking account was reduced by several NSF checks from their customers. These NSF checks caused appellants' $3,500 check to Green Tree to bounce.

On July 10, 1998, appellants issued check No. 6231 in the amount of $1,105.50 for their monthly payment to Green Tree. This check cleared the bank on July 20, 1998. Appellants also issued check No. 6232 in the amount of $1,500 to pay what they believed to be the balance of the balloon payment. This check cleared the bank on July 21, 1998.

On July 12, 1998, the bank notified appellant Karen Mather that the $3,500 check had bounced. As a result, she wrote another $3,500 check from a different account and sent it directly to Green Tree. This replacement check bounced on July 22, 1998. Instead of contacting appellants, Green Tree redeposited the check. The check still failed to clear the bank and came back on July 30, 1998. However, the bank did not inform appellants of this fact until after August 5, 1998.

On July 23, 1998, Green Tree sent a payoff notice to respondent Thiele. On July 28, 1998, respondent Brooks sent appellants a facsimile message demanding payment of $2,737.29 by 5:00 p.m. Brooks acknowledged she had waived timely performance in the past and reminded Karen Mather about the August 1 payment owing to respondents. Brooks demanded that appellants make a payment by way of direct deposit, although this was not a term of the agreement. That same day, Karen Mather communicated with Green Tree and issued a $2,748.16 check to the latter. She sent the check to Brooks who forwarded it to Green Tree. The check cleared the bank on August 4, 1998.

On July 15, 1998, Thiele began investigating proceedings to repossess the truck. On August 5, 1998, respondents learned for the first time that the $3,500 check to Green Tree had bounced. They called appellants, who mistakenly believed they had already taken care of the problem and so signified to Thiele. Thiele demanded delivery of the truck but did not provide an address to which the truck could be driven. Thiele then violated his parole and took the truck without notice to appellants. Thiele detained the vehicle without giving appellants an opportunity to send Green Tree a cashier's check, as provided for in the agreement. Later that evening, Eric Jacobs alerted appellant Tom Mather and assisted the latter in regaining possession of the truck from Thiele.

On August 6, 1998, Thiele sent a facsimile message to appellants and indicated an intent to dispose of the motor vehicle. The notice gave appellants 15 days to "redeem" the vehicle and 15 days to "reinstate" the contract. The notice erroneously quoted a balance due of $40,968.36 and further erroneously quoted a contractual breach in the sum of $6,002.90. On the same date, Green Tree sent Thiele a facsimile message recounting the history of the $3,500 NSF checks. The facsimile erroneously identified other checks as not clearing.

On August 7, 1998, Thiele returned to custody for violation of parole. Jacobs told appellants he was in charge of the truck. That same day, Jacobs and Thiele had a disagreement about appellants' performance of the contract. Jacobs told Thiele the appellants had done everything they said they would. On August 9, 1998, Eric Jacobs promised appellants he would have the truck put into appellants' names so it could not be repossessed again. On August 10, 1998, Mathers sent Green Tree a $3,500 cashier's check in full payment of the lien.

On August 20, 1998, appellants sent respondents a $1,304.74 check for the August payment. The check included a $50 late fee to bring the account current. This occurred within the 15-day reinstatement period set forth in Thiele's notice of intention to dispose of motor vehicle and was the only amount due at the time. On September 1, 1998, Thiele

had a girlfriend contact A-1 Recovery to again repossess the truck. On September 4, 1998, appellants sent respondent Brooks a $1,254.74 cashier's check for the September payment. That same day, Brooks signed a hold harmless letter agreement with A-1 Recovery with respect to repossession of the truck.

During the early morning hours of September 6, 1998, A-1 Recovery retook the truck from appellants' possession. Appellants contacted Jacobs, who told them he had washed his hands of the entire matter. On September 9, 1998, respondents mailed appellants the uncashed checks for the August and September payments. Thiele testified he did this to intentionally mislead appellants. However, Green Tree never returned the August 10, 1998, $3,500 payment to appellants. On September 16, 1998, appellants' attorney demanded return of the truck but respondents refused.

Respondents placed the truck in storage and made no effort to sell or lease it. On January 4, 1999, Thiele was again released from custody and began running the truck himself. Although the vehicle had cleared inspection one month prior to repossession, Thiele spent $3,434.93 on additional maintenance, tires, and repairs. In March 1999, Thiele traded the truck in, received an $36,000 trade-in allowance, and purchased a new truck in its place.

## DISCUSSION

On appeal, appellants first contend the trial court's failure to issue a statement of decision upon their timely request requires a mandatory reversal.

On September 5, 2000, the trial court issued a statement of intended decision covering the issues of breach of contract and agency. The court mailed this statement to counsel on September 6, 2000. The statement provided in relevant part:

> "**1. Agency:** The evidence only supports a rendering of family or filial service by Eric Jacobs to his mother, Shirley Brooks. There is not relevant evidence sufficient to support an express or ostensible agency relationship with either Mr. Thiele or Mrs. Brooks beyond an express authorization to repossess the truck, if, on breach the Mathers failed to

tender return of the truck to 'James R. Thiele and Shirley A. Brooks.' [Ex. 9].

"**2. <u>Material Breach of Contract</u>.** The operative contract was Ex. 9. Material breaches occurred when Mrs. Mather tendered multiple checks with insufficient funds to satisfy them at the time of issuance. The Defendants had the right to full payment as of August 5, 1998 or possession of the vehicle.

"This Statement of Intended Decision shall be the Statement of Decision unless there is a request for Statement of Decision timely submitted pursuant to CCP § 632 and CRC Rule 232. If such a request is submitted, counsel for Defendants/Cross-Complainants is designated to submit a proposed Statement of Decision and proposed Judgment."

On September 15, 2000, appellants filed a request for statement of decision as follows:

"Pursuant to CRC Rule 232, Plaintiffs hereby request a Statement of Decision regarding the following additional issues in addition to those set forth by the Court in its intended decision:

"1. The legal consequences of the forfeiture provision contained in the contract set forth in Exhibit 9.

"2. Whether Defendants failed to disclose the driveline problem of the truck at the point of sale and its legal consequences.

"3. Whether Defendants failed to mitigate their damages by allowing the truck to be dormant between September 5, 1998 and January 2, 1999.

"4. Whether Defendants' actions breached their duty of good faith and fair dealing under the contract.

"5. The legal effect of the Defendants' prior waivers of breaches of contract up to the date when the vehicle was repossessed.

"6. The legal effect of Defendants' acceptance of the final payment to Greentree after the alleged statement of repossession (as found in Exhibit 20).

"7. Whether Defendants' statement of repossession dated August 6, 1998 gave Plaintiffs a fifteen-day right of reinstatement.

"8. The legal effect of Defendants' overinflated fifteen-day notice of redemption as set forth in Exhibit 20.

"9. Was there a failure of consideration for the March 28, 1998 contract.

"10. Was the March 28, 1998 contract null and void on August 5, 1998 for Plaintiffs' failure to complete the $5,000.00 downpayment."

Code of Civil Procedure section 632 states in relevant part:

"In superior . . . courts, upon the trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required. The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial. The request must be made within 10 days after the court announces a tentative decision unless the trial is concluded within one calendar day or in less than eight hours over more than one day in which event the request must be made prior to the submission of the matter for decision. The request for a statement of decision shall specify those controverted issues as to which the party is requesting a statement of decision. After a party has requested the statement, any party may make proposals as to the content of the statement of decision.

"The statement of decision shall be in writing, unless the parties appearing at trial agree otherwise; however, when the trial is concluded within one calendar day or in less than 8 hours over more than one day, the statement of decision may be made orally on the record in the presence of the parties."

California Rules of Court, rule 232 states in relevant part:

"(a) [Announcement and service of tentative decision; modification] On the trial of a question of fact by the court, the court shall announce its tentative decision by an oral statement, entered in the minutes, or by a written statement filed with the clerk. Unless the announcement is made in open court in the presence of all parties who appeared at the trial, the clerk shall forthwith mail to all parties who appeared at the trial a copy of the minute entry or written tentative decision.

"The tentative decision shall not constitute a judgment and shall not be binding on the court. If the court subsequently modifies or changes its announced tentative decision, the clerk shall mail a copy of the modification or change to all parties who appeared at the trial.

> "The court in its tentative decision may (1) state whether a statement of decision, if requested, will be prepared by the court or by a designated party, and (2) direct that the tentative decision shall be the statement of decision unless within ten days either party specifies controverted issues or makes proposals not covered in the tentative decision.
>
> "(b) [Proposals following request for statement of decision (Code Civ. Proc., § 632)] Any proposals as to the content of the statement of decision shall be made within 10 days of the date of request for a statement of decision.
>
> "(c) [Preparation and service of proposed statement of decision and judgment] If a statement of decision is requested, the court shall, within 15 days after the expiration of the time for proposals as to the content of the statement of decision, prepare and mail a proposed statement of decision and a proposed judgment to all parties who appeared at the trial, unless the court has designated a party to prepare the statement as provided by subdivision (a) or has, within 5 days after the request, notified a party to prepare the statement. A party who has been designated or notified to prepare the statement shall within 15 days after the expiration of the time for filing proposals as to the content of the statement, or within 15 days after notice, whichever is later, prepare, serve and submit to the court a proposed statement of decision and a proposed judgment. If the proposed statement of decision and judgment are not served and submitted within that time, any other party who appeared at the trial may: (1) prepare, serve and submit to the court a proposed statement of decision and judgment, or (2) serve on all other parties and file a notice of motion for an order that a statement of decision be deemed waived." (Cal. Rules of Court, rule 232(a), (b) & (c).)

Upon the timely request of one of the parties in a nonjury trial, a trial court is required to render a statement of decision addressing the factual and legal bases for its decision as to each of the principal controverted issues of the case. (*Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1124.) A statement of decision allows the trial court to review its tentative decision and to make corrections, additions, or deletions it deems necessary or appropriate. Such a statement enables a reviewing court to determine what law the trial court employed. Moreover, the statement allows the trial court to place upon the record its view of facts and law of the case. (*In re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 647.) Thus, it makes the case easily reviewable on appeal by exhibiting

the exact grounds upon which the judgment rests. To the parties, it furnishes the means, in many instances, of having their cause reviewed without great expense. The statement of decision also furnishes to the losing party a basis of his or her motion for a new trial. (*Whittington v. McKinney* (1991) 234 Cal.App.3d 123, 127.)

Failure to issue a statement of decision in response to a timely request therefor is reversible error. (*Gruendl v. Oewel Partnership, Inc.* (1997) 55 Cal.App.4th 654, 659; *Whittington v. McKinney, supra,* 234 Cal.App.3d at p. 127.) Respondents attempt to avoid this fundamental legal principle by characterizing appellant's issues in the request for statement of decision as immaterial:

> "With the Trial Court's determination and express finding that MATHERS had breached the terms of the contract by tendering multiple checks that were ultimately returned for insufficient funds, the nature of the ten 'additional issues' raised by MATHERS became immaterial. [¶] . . . [¶]
>
> "Issue #1 concerns a purported 'forfeiture' provision in the contract. The findings of the trial court that plaintiffs breached the contract, and that defendants were entitled to recover damages related to their cross-complaint, impliedly confirms that the Trial Court did not find any provision of the agreement to constitute a 'forfeiture.'
>
> "Issues #2, 6, 7, 8, 9 and 10, regarding the relevance of defendants' alleged lack of disclosure to MATHERS, acceptance of a 'final payment', reinstatement and redemption rights, 'failure of consideration' and 'nullity' are also made immaterial on the same reasoning. In other words, the Trial Court could only have disregarded such arguments in finding that the actions of MATHERS constituted a material breach of a legally enforceable and identifiable contract.
>
> "Issue #3, regarding BROOKS' alleged failure to mitigate damages was resolved by the Court's ruling in favor of the cross-complainants on their right to *full* payment ($4,860.53)
>
> "Issue #4, regarding whether BROOKS' actions were a breach of good faith and fair dealing is wholly immaterial, since, with the exception of certain insurance contracts, a cause of action for breach of the covenant of good faith and fair dealing is duplicative of a cause of action for breach of

contract. See, e.g., Careau v. Security Pac. Business Credit, Inc. (1991) 222 Cal.App.3d 1371.[2]

"Issue #5, as to the legal effect of alleged 'waivers,' is again an immaterial issue, because it can reasonably be inferred that the Trial Court weighed the evidence regarding any possible waivers, and wholly disregarded such matters in ruling that MATHERS' breach was caused by multiple bad checks.

"An express finding on each of these issues would constitute an 'empty formalism' and the lack of such findings, in light of the express findings of the Trial Court, does not constitute reversible error."

In addition to characterizing appellant's issues as "immaterial," respondents maintain the trial court's findings are wholly dispositive and that substantial evidence exists to support those findings. Respondents' impassioned arguments gloss over the fact that they failed to comply with the directive in the statement of intended decision to "submit a proposed Statement of Decision and proposed Judgment" upon timely request. In California we have long held that no one can take advantage of his own wrong. (Civ. Code, § 3517.)

Respondents ultimately acknowledge that any error requires, at most, a remand to the trial court for issuance of a statement of decision rather than a new trial. Respondents' point is well taken. Where counsel makes a timely request for a statement of decision upon the trial of a question of fact by the superior court, that court's failure to prepare such a statement is reversible error. The appropriate remedy is to remand the matter to permit the court to issue a statement of decision. For such reason we do not reach the other issues raised by appellants in this appeal. A statement of decision which adequately explains the factual and legal basis for the trial court's decision on the controverted issues would put this case in a more appropriate posture for appellate review

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**2** The correct citation is *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d. 1371.

and would materially aid this court's consideration of the issues on appeal.[3] (*Social Service Union v. County of Monterey* (1989) 208 Cal.App.3d 676, 681.) We will therefore remand to permit the trial court to issue a statement of decision.

We point out for the benefit of the trial court and counsel that the statement of decision procedure does not authorize the party demanding the statement to conduct a limitless inquisition of the trial court. (*Muzquiz v. City of Emeryville, supra,* 79 Cal.App.4th at pp. 1125-1126; *People v. Casa Blanca Convalesecent Homes, Inc.* (1984) 159 Cal.App.3d 509, 524, disapproved on another point in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 184-187.) The trial court's statement of decision need only set out the ultimate facts and the law supporting the trial court's decision on the essential controverted issues at trial and need not respond point by point to whatever issues or questions may be posed in the request, as this court has held. (*Kazensky v. City of Merced* (1998) 65 Cal.App.4th 44, 68; see also *Muzquiz v. City of Emeryville, supra*, at pp. 1125-1126.)

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**3** This is particularly true in the instant appeal, where appellants seek to determine, among other things, whether (a) the forfeiture provisions of the second contract violated public policy and Civil Code section 3275 (relief in case of forfeiture); (b) respondents failed to give appellants notice and a reasonable opportunity to comply with the contract before repossessing the truck; and (c) the trial court erroneously refused to rule that respondents failed to mitigate their damages.

## DISPOSITION

The judgment is reversed and the matter is remanded to the trial court for further proceedings consistent with this opinion. The parties shall each bear their own costs on appeal.

_____
HARRIS, J.

WE CONCUR:

_____
DIBIASO, Acting P. J.

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CORNELL, J.